RESULTS OF THE BERING SEA ARBITRATION.

BY THE HON. JOHN W. FOSTER, EX-SECRETARY OF STATE.

THE United States stand distinguised among the nations as the foremost champion of international arbitration. Our ablest and wisest statesmen have recognized it as the best way of adjusting most questions of difference arising between governments, when the ordinary diplomatic methods fail. Such being the settled policy of the country, it would be unfortunate for the cause of peace and civilization in the world if that policy should be prejudiced in the United States for want of correct information or through partisan bias.

One of the last arbitrations in which the United States participated was that held at Paris in 1893 for the settlement of the questions which had arisen with Great Britain respecting the fur seals of the Pribylov Islands in Bering Sea; and the impression seems to prevail with many of our people that this arbitration was unwisely entered upon, that it was fruitless in its results to us, and that the responsibility for the failure is chargeable to the administration which agreed to it. Every one of these conclusions is incorrect, and, in the interest of the great cause of international arbitration, their fallacy should be exposed. It seems the more opportune at this time, as the subject is likely to be presented anew to Congress at its approaching session.

It is well, in the first place, to examine the origin of the controversy. Alaska was ceded by Russia to the United States in 1867, and in 1870 the Seal Islands in Bering Sea were leased by the government to a private company, with the privilege of taking on the land a certain number of seals annually. Soon thereafter it became apparent that the seal herd was exposed to serious diminution by means of pelagic or open sea hunting. As early as 1872 the attention of the government was called to this

danger, and it was suggested that a revenue cutter be sent to cruise in the vicinity of the passes of the Aleutian chain, through which the herd travelled on its way to and from the Seal Islands, with a view to preventing such hunting. But Mr. Boutwell, Secretary of the Treasury, declined to act upon the suggestion, stating: "I do not see that the United States would have the jurisdiction or power to drive off parties going up there for that purpose, unless they made the attempt within a marine league of the shore." With the progress of time pelagic hunting increased along the Canadian and American coasts, with greater slaughter of the herd, and with occasional incursions into Bering Sea. There was gradually developed a contention that the principle laid down by Secretary Boutwell did not apply to Bering Sea, because Russia had claimed and enforced exclusive jurisdiction over all its waters, that it had been acquiesced in by the maritime nations, including Great Britain, and that all the rights of Russia therein passed to the United States by the cession. The act of Congress of 1868 (Section 1956) made it unlawful to kill seals "within the limits of Alaska Territory or *in the waters thereof*," and it was claimed that the waters of Alaska embraced all that portion of Bering Sea east of the line designated in the Russian treaty of cession. Under the foregoing construction of the treaty and the statute, the first seizure of British vessels in Bering Sea took place under instructions of the Secretary of the Treasury by the Revenue vessels in 1886, and other seizures followed in 1887. Suits were instituted in the Federal Court at Sitka under the Act cited and the vessels were condemned. The judge, whose tenure of office under the practice in vogue as to that Territory was limited to the political administration which appointed him, following the line of argument submitted by the District Attorney in a brief prepared in the office of the Attorney-General, held that "all the waters within the boundary set forth in the treaty . . . are to be considered as comprised within the waters of Alaska, and all the penalties prescribed by law . . . must therefore attach within those limits." He further held that "as a matter of international law, it makes no difference that the accused parties may be subjects of Great Britain. Russia had claimed and exercised jurisdiction over all that portion of Bering Sea . . . and that claim had been tacitly recognized and acquiesced in by the other maritime powers of the world."

The seizure and condemnation of the British vessels were followed by an attempt to secure a more precise and strict definition of "*the waters of Alaska*" by Congressional legislation. A lengthy investigation was had by a Committee of the House of Representatives in 1888; and in January, 1889, a report was made by Mr. Dunn, of Arkansas, chairman of the Committee, fully sustaining the view taken by the Attorney-General and the Federal Judge in Alaska, and submitting a bill which declared "that Section 1956 of the Revised Statutes of the United States was intended to include and apply to, and is hereby declared to include and apply to, *all waters of Bering Sea* in Alaska embraced within the boundary lines" of the treaty with Russia. This bill was passed by the House, but in the Senate it was sent to the Committee on Foreign Relations, and that Committee recommended that the clause above quoted be disagreed to; and the chairman, Mr. Sherman, in support of the recommendation, stated that the proposed legislation "involved serious matters of international law . . . and ought to be disagreed to and abandoned, and considered more carefully hereafter." Subsequently, by virtue of a conference report, an act was passed declaring Section 1956 to include and apply "to *all the dominion* of the United States in the waters of Bering Sea."

The seizure and condemnation of vessels as stated constitute the origin and foundation of the complaint of the British Government and of the lengthy correspondence and negotiations which resulted in the arbitration at Paris. These seizures were the act of the administration of President Cleveland, and had the indorsement of the executive, politico-judicial and legislative departments of that administration. In so far as the views of the opposing political party may be inferred from the attitude of Secretary Boutwell and Senator Sherman, they were against the legality or wisdom of the policy.

The complaint of Great Britain in 1887 was followed by a diplomatic correspondence, in which Secretary Bayard, without discussing or yielding the grounds upon which the seizures had been made, proposed an international arrangement for the protection of the seals from extermination. With this proposition pending and with all the questions arising out of the seizures unsettled, the executive government of the United States passed into the hands of President Harrison. Mr. Blaine, on assuming the duties

of Secretary of State, sought to carry into effect the proposition of his predecessor for an international agreement. He found that few of the governments approached had shown any interest in the proposition, but early in the administration he pressed the subject upon the attention of Great Britain, and as soon as possible secured a joint conference at Washington with the British and Russian Ministers. After prolonged interviews the conference proved a failure, as Great Britain was unwilling to enter into any international arrangement which the two other interested powers felt was at all adequate to protect the seals from extermination.

The measure which Secretary Bayard had initiated for the settlement of the questions arising out of the seizure of British vessels having proved impossible of realization, there seemed no other alternative but to defend the action of the previous administration; and thereupon followed the notable diplomatic correspondence between Mr. Blaine and Lord Salisbury, in which the former sought with all his recognized forensic skill to defend the action of the Secretary of the Treasury in ordering the seizures and, as far as he felt it possible to do so, to sustain the correctness in international law of the attitude of the Attorney-General and the Judge of the Federal Court of Alaska. In no part of that statesman's career did his devotion to his country more conspicuously rise above partisanship than in that correspondence. It is doubtful if any other living American could have made a more brilliant or effective defence of the action of his government, and whatever fallacies exist in his argument are chargeable to the previous administration which had occasioned the controversy and marked out the line of defence.

The correspondence showed the two governments in hopeless disagreement. Three courses were open to President Harrison, and one of them must be chosen without further delay. First: He could abandon the claim of exclusive jurisdiction over Bering Sea or protection of the seals beyond the three mile limit, recede from the action of his predecessor as to seizure of British vessels and pay the damages claimed therefor. Such a course would have met with the general disapproval of the nation, and would have been denounced by his political opponents as a base betrayal of the country's interests. Second: He could have rejected the arguments and protests of the British Government, and continued the policy initiated by his predecessor in the seizure

of all British vessels engaged in pelagic sealing in Bering Sea. But this course had already been proposed to President Cleveland and decided to be improper. The Hon. E. J. Phelps, who as Minister to Great Britain had conducted the negotiations with Lord Salisbury growing out of the seizures of 1886 and 1887, in a lengthy dispatch to Secretary Bayard, reviewing the conduct of Canada which had prevented an adjustment once accepted by Lord Salisbury, made the following recommendation: "Under these circumstances, the Government of the United States must, in my opinion, either submit to have these valuable fisheries destroyed or must take measures to prevent their destruction by capturing the vessels employed in it. Between these two alternatives it does not appear to me there should be the slightest hesitation. . . . I earnestly recommend, therefore, that the vessels that have been seized while engaged in this business be firmly held, and that measures be taken to capture and hold every one hereafter found concerned in it. . . . There need be no fear that a resolute stand on this subject will at once put an end to the mischief complained of." But this recommendation of Mr. Phelps was not approved by Mr. Bayard, who was unwilling to adopt a course which might bring about a rupture with Great Britain, the probable outcome of which would have been an armed conflict. In view of this decision and the state of public sentiment, with a prevailing opinion in a large part of the press and with public men that the attitude of the government was legally unsound, and that the interests involved did not under the circumstances stated justify the hazard of a great war between these two English-speaking nations, the adoption of this second alternative by President Harrison would have been the height of madness. The only remaining alternative was arbitration. President Harrison felt that if we could commit to an international tribunal the far greater interests and principles involved in the Alabama Claims, it would be the part of wisdom to adopt the same course as to the pending questions of difference, and there can be no doubt that the sober judgment of the country confirms his action.

If, therefore, the Paris arbitration was unwise in any of its features it must have been in the manner of submission of the questions to the Tribunal. But in this respect, also, the conduct of President Harrison was greatly restricted by the action of his

predecessor. He was required to formulate for the decision of the Tribunal the contentions upon which the seizures were made, and the first four points embraced in article VI. of the treaty will be found to accurately cover the grounds upon which the Attorney-General in 1887 asked for, and the Federal Judge based, the condemnation of the British vessels. It is a singular incident that when the case of the United States came to be prepared and the Russian archives were examined, what had been assumed in the legal proceedings to be historical facts could scarcely be substantiated by a single official document. It is also notable that the only additional question introduced in the treaty provision for submission to the Tribunal—that embraced in the fifth point, to wit, the right of protection or property in the seals, and which in the judgment of the counsel of the United States became the leading, if not the only, defence of the seizures—was not advanced in the legal proceedings of 1887, and was not mooted until a late stage of Mr. Blaine's controversy with Lord Salisbury. The chief credit for the development of this point is due to Mr. Tracy, Secretary of the Navy, who submitted a paper of rare legal ability on the subject to the President, which at a later date appeared in this REVIEW.* The treaty after having undergone the careful scrutiny of the President and Hon. E. J. Phelps, whose advice had been sought by the President, was submitted to the Senate and approved by that body without a single dissenting voice, so far as known. If the conduct of the President, in the management of the controversy created by his predecessor, had not been in the judgment of the country wise and patriotic, or if the provisions of the treaty had not been properly framed, it would scarcely have escaped the attention of his political opponents in the Senate.

Hence, the only remaining criticism which might be advanced against the arbitration must relate to the management of the case before the Tribunal. But in this respect also it must be recognized that the President's action was circumspect and free from all partisanship. In naming the arbitrators on the part of the United States, he chose, with the cordial approval of the Chief Justice and his associates, Mr. Justice Harlan of the Supreme Court, as senior American member of the Tribunal. In filling the second place he selected Senator Morgan, the recognized

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leader on all international questions in the Senate of the party whose officials had originated the subject matter of arbitration. Hon. E. J. Phelps, President Cleveland's Minister in London, an experienced diplomatist and a lawyer of national repute, had been consulted by the President several months before the treaty had been agreed upon, and when the case came to be prepared he was named as senior counsel. With him was associated James C. Carter, of New York, the recognized leader of the American bar; and before the tribunal was organized Frederick R. Coudert, an accomplished French scholar and a prominent jurist, was added to the list. These three gentlemen were the political friends of Mr. Cleveland. With them was joined a single party friend of President Harrison, H. W. Blodgett, for many years a distinguished judge of the Federal Court. Senator Morgan in a recent letter says: "Our party was and is responsible for using the means that were employed both for the raising and the settlement of these questions, and it was a just measure of responsibility that Mr. Harrison devolved upon us when, out of a body of arbitrators and counsel and Mr. Secretary Foster, the Agent, selected by him—seven in all—he selected four Democrats and three Republicans." As to the manner in which these gentlemen discharged their trust we have the following testimony of Mr. Justice Harlan, in a public address: "I may say that no government was ever represented upon any occasion where its interests were involved with more fidelity, with more industry and with greater ability than was the United States by its agent and counsel. . . . If more was not obtained it was solely because a majority of that tribunal . . . did not see their way to grant more."

On five points submitted to the Tribunal, embracing the historical and legal questions, the decision was unfavorable to the United States. While the action of the government in making the seizures was based on the weakest ground of our defence and which proved untenable, it cannot be doubted that the motives which actuated its conduct were patriotic and praiseworthy. But had our effort to save the seals from destruction been from the outset based upon a right of protection and property in them, our case before the Tribunal would have been much stronger and the decision might have been different. Nevertheless, it cannot be justly claimed that the arbitration was fruitless in its results

for us. It is no small matter that a question which threatened a rupture of our peaceful relations with Great Britain was adjusted by a resort to the arbitrament of reason and not of force. The Alaskan seal herd is of great value to us and to the world, and it is the duty of our government to be vigilant in protecting it from destruction; but the legal issues involved in our controversy with Great Britain regarding them did not seem to justify the hazard of an armed conflict, and it was a great gain to us that the controversy was peacefully settled without national dishonor.

The decision of the Tribunal was adverse to the United States on the legal points in dispute, but the award contained an important provision for international regulations, which were intended by the Tribunal to be a protection to the seals and which in the judgment of the majority of that body would in practice prove an adequate protection. The agent and counsel of the United States contended that no regulations would be a certain protection of the herd which did not prohibit all pelagic sealing, and the American arbitrators voted for such prohibition, and sustained their votes by very able and cogent opinions; but the majority of the Tribunal took a different view of the subject. The regulations adopted were opposed both by the American and Canadian arbitrators. When first published they were accepted by all the Americans who participated in the arbitration as a decided triumph for the United States, and were regarded by the Canadian sealers as a serious menace, if not a death-blow, to their interests. If they are carefully examined they will be found to be more favorable to the United States than the regulations which Mr. Bayard proposed to Lord Salisbury as a settlement of the question, or which Mr. Blaine offered to Sir Julian Pauncefote. If, therefore, we obtained more from the Tribunal than our government proposed to accept from Great Britain, the arbitration cannot justly be characterized as fruitless in its results for us. The adequacy of the regulations cannot be properly judged, because they have not yet been put in force in their true spirit and intent. This will not be done until they are also made to apply to the Russian waters, and until more stringent rules for their enforcement are adopted. It has been a source of disappointment to many who have taken an interest in the preservation of the seals that these rules have been so lax and so imperfectly observed.

The obstruction in these respects is now, as it has been from the beginning, the selfish and inhuman conduct of Canada.

The purpose of this article, to wit, the defence of the policy of international arbitration, has been accomplished; as it has been shown by the foregoing review that the Paris arbitration was not unwisely entered upon, that it was not altogether fruitless in its results for us, and that the administration which agreed to it cannot be held culpable for the manner of its submission or management. But it will naturally be expected that something be said concerning the question of damages, a subject which was not settled by the award. In article VIII. of the Treaty it was expressly stipulated that "the question of liability of each for the injuries alleged to have been sustained by the other" should not be embraced in the arbitration, but should "be the subject of future negotiation." In the discussion following the adjournment of the Tribunal, the fact seems to have been lost sight of that the United States preferred serious claims for damages against Great Britain on account of the injuries done by British pelagic sealers to the Alaskan seal herd, and that President Harrison proposed that this question of damages should, together with the British claims for seizure of vessels, be submitted to the Tribunal. It was because Great Britain refused to consent to arbitrate this claim that the whole subject was omitted. The award of the Tribunal was in effect that in certain waters, and at certain times, pelagic sealing is improper and should not be permitted. How far the claim of the United States subsists for injuries in the past sustained by the seal herd in those times and waters is one of the questions to be determined by the "future negotiations" contemplated in the Treaty; and prominent persons well informed as to the controversy contend that it is still a vital question.

While the liability for damages was not within the jurisdiction of the Tribunal, it is generally admitted that the effect of its decision was to fix upon the United States a certain measure of responsibility for damages on account of the seizures, which would have to be met through the "future negotiations." Without further investigation than the documentary evidence before the Paris Tribunal, the sum of $425,000 was agreed upon between the Secretary of State and the British Ambassador as a full satisfaction of the claims for the seizure of the British vessels, and the Congress of the United States was asked to make an

appropriation for that purpose. In the discussion which arose in the House of Representatives when the subject came before that body it was most unfortunate that it should have assumed a partisan aspect. When certain members argued that the sum asked for was greatly in excess of the just and legal claims of the Canadian sealers, and that it was in direct conflict with the views of the Agent and Counsel of the United States before the Tribunal, they were taunted with the charge that this obligation had been contracted by the administration of which they were supporters. The member of the Committee on Appropriations who had the measure in charge said: "This is not our foreign policy. We are paying a debt which you gentlemen gave us." Mr. McCreary, Chairman of the Committee on Foreign Affairs, in advocacy of the appropriation, used this language: "I regret that we have been placed in an attitude where we have to pay this amount; but the gentlemen on the other side of this House cannot claim that we caused the existing situation." How unwarranted were these assertions is shown in the foregoing review.

It may have been the wisest policy to vote the appropriation, but it was no breach of our international obligations not to approve of that sum; and it is not to the discredit of Congress that it exercised its judgment as to the action of the executive in agreeing to a settlement with Great Britain which altogether ignored the claim of the United States for damages to the seals by improper pelagic hunting, and the views of its own representatives before the Tribunal as to the British claims. While a difference of views may properly exist between the executive and legislative departments upon these subordinate questions, no disposition has been entertained or shown by any portion of our government or people to evade our just obligations under the Treaty. And the fact that the spirit of the award leads us to pay out of the national treasury a sum by way of damages, which at the most must be regarded as insignificant for a great nation, should certainly have no tendency to modify in the slightest degree our devotion to the great policy of international arbitration.

JOHN W. FOSTER.